

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Amendment of Section 73.622(b)
Table of Allotments
Digital Television Broadcast Stations
(Boca Raton, Florida)

) **DOCKET FILE COPY ORIGINAL**
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) **MM Docket No.00-138**
) **RM-9896**
)

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To: The Secretary, for forwarding to the Commission

AUG - 8 2005

REPLY

Federal Communications Commission
Office of Secretary

1. Sherjan Broadcasting Co., Inc. "Sherjan" hereby replies to the "Opposition to Application for Review" in the above-captioned proceeding, filed on July 29, 2005, by Guenter Marksteiner ("Marksteiner"). Marksteiner's Opposition was directed at Sherjan's Application for Review ("AFR"), filed July 1, 2005.

2. This proceeding involves the substitution of DTV Channel *40 for DTV Channel *44 to be used by WPPB-TV, Boca Raton, Florida. It is noteworthy that the School Board of Broward County, Florida ("School Board"), licensee of WPPB-TV, did not file anything in response to Sherjan's AFR. Only Marksteiner filed. Even though Marksteiner participated earlier in this proceeding, the School Board also participated at that time. In the absence of current participation by the School Board, Sherjan submits that Marksteiner does not have independent standing at this point to pursue his own interests in this docket.

3. Marksteiner's only interest in this proceeding is that he wishes to use Channel 44 as a future displacement channel for his Station WHDT(TV), Stuart, Florida.¹ In

¹ WHDT is a digital-only station, with no paired channel allotment, operating on Channel 59.

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School Board of Dade County, 18 FCC Rcd 24047 (WTB 2003), the Commission denied standing to a prospective applicant that claimed it “would not be able to obtain the channels if we granted the....application,” stating that “an entity that expects to file an application in the future is....without standing because such a claim of potential economic injury is too remote and speculative to show standing as a party in interest.”² Accordingly, Marksteiner’s Opposition should be dismissed.

4. Even if examined on the merits, Marksteiner’s position cannot prevail. His arguments are (a) that the Commission has used 1990 census data rather than 2000 census data in recent cases, and (b) that application of the Longley-Rice study method to a 1 km cell is not “uncommon.”³ Even if those assertions are true,⁴ they do not dictate that the Media Bureau’s action be upheld in this proceeding. The Commission must be a “rational decision-maker.”⁵ As previously noted by Sherjan, it is simply not rational to use outdated census data, at least under circumstances when a proceeding is contested and more up-to-date data are available, because the purpose of the exercise is to avoid interference now, not 15 years ago. It is also not rational to make a decision intended to

² The fact that Marksteiner is a licensee, while the petitioner in *School Board of Dade County* was not a licensee, is a distinction without a difference in this case, because in both cases, the petitioners seek to preserve an opportunity to file for a channel in the future.

³ Marksteiner Opposition at p. 3.

⁴ Neither the Report and Order, DA 05-1702, or the Notice of Proposed Rule Making, 15 FCC Rcd 9524 (MB 2000) nor the Further Notice of Proposed Rule Making, 18 FCC Rcd 14460 (MB 2003) in *Oklahoma City, OK*, explicitly discuss the use of 1990 census data; and in any event, MB Docket No. 00-104 was uncontested, so acceptance of any data that may have been presented by a private party in support of a petition cannot be deemed binding precedent.

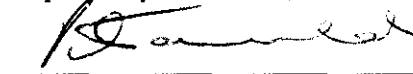
⁵ See *Texas Office of Public Utilities Counsel v. FCC*, 265 F.3d 315 (5 Cir. 2001).

avoid interference based on a particular single cell size when examination of virtually every other cell size leads to the opposite end result.⁶

5. In light of the foregoing, it is clear that decision below is not legally sustainable. One can draw on narrow precedents to support various specific arguments; but the end result of the process must make sense in light of the purpose of the regulatory scheme, *which is to avoid interference in real life*. In this case, the Media Bureau lost sight of the ultimate purpose, selecting the one cell size that produced a contrary result to all other sizes and relying on old population figures that do not reflect the people whose television receivers will be affected. The Bureau's decision thus must be reversed to arrive at a legally sustainable result.

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Respectfully submitted,



Peter Tannenwald

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August 8, 2005

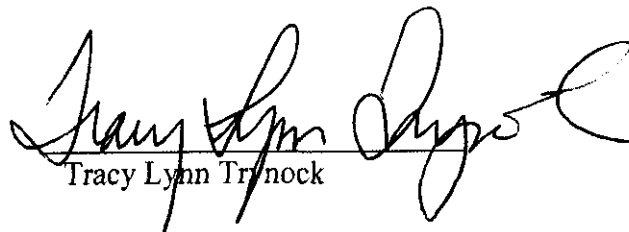
⁶ Moreover, as noted by Sherjan in its AFR, the Media Bureau erred by dismissing Sherjan's attempt to address the changing cell size issue by filing a reconsideration petition that, as required by Section 1.115(c) of the Rules, placed the issue before the Bureau before it was brought to the full Commission. The target cannot be moved around at will without allowing Sherjan to shoot at the new resting place.

CERTIFICATE OF SERVICE

I, Tracy Lynn Trynock, do hereby certify that I have, this 8th day of August, 2005, caused to be sent by first class United States mail, postage prepaid, a copy of the foregoing "Reply" to the following:

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